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No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1959

P. LORILLARD COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals and the dissenting opinion of Judge Steel (Pet. A-1—A-17) are reported in 267 F. 2d 439. The initial decisions of the hearing examiner and the decisions of the Federal Trade Commission adopting these initial decisions (PL 97a-115a; GF 125a-143a)[1] are not yet reported.

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[1] "PL" references are to the Appendix to the brief of petitioner Lorillard Company in the court below. "GF" references are to the Appendix to the brief of petitioner General Foods Corporation in the court below.

JURISDICTION

The judgments of the court of appeals were entered on June 4, 1959, rehearing was denied on August 4, 1959, and a "final decree" in the two cases was entered on September 14, 1959 (Pet. B-1—B-5). The petition for a writ of certiorari was filed on November 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A broadcasting company entered into agreements with certain chain grocery stores which provided that it would furnish to the contracting chain a specified amount of broadcasting time for the latter's own advertising, and that the chain would conduct a specified number of promotional displays in its stores, with the broadcasting company later designating the products so to be displayed. Subsequently the broadcasting company solicited petitioners (and other manufacturers and sellers of grocery products) to purchase radio or television time and, as an inducement, offered in-store promotions of petitioners' products in the chain stores under contract. Petitioners' chain store customers who thus obtained advertising time competed in the resale of its products with other customers of petitioner who were not given any like opportunity to obtain broadcasting time in exchange for furnishing promotional displays. On these facts, the principal question presented is:

Whether petitioners paid anything of value "for the benefit of" certain chain store customers "as compensation or in consideration for" promotional

services furnished by these customers, within the meaning of §2(d) of the Clayton Act.[2]

STATUTE INVOLVED

Section 2(d) of the Clayton Act, 15 U.S.C. 13(d), provides:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

STATEMENT

The complaints issued by the Federal Trade Commission in these cases charged that petitioners, manufacturers and sellers of products sold in grocery stores, had violated §2(d) of the Clayton Act by making payments to certain broadcasting companies for the benefit of chain-store customers of petitioners. Since the pertinent facts as to each petitioner, including the contracts made by the three broadcast-

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[2] A further question presented by the petition (discussed *infra*, p. 12) is whether the court below based its decision upon a ground not considered and determined by the Commission.

ing companies involved, are substantially identical, for clarity we shall deal with the facts in terms of one petitioner and one broadcasting company. The cases were heard on fact stipulations (PL 10a-14a; GF 15a-19a), which embraced numerous attached exhibits, and the facts are not disputed.

Contracts made by a broadcasting company with a number of chain grocery stores provided the chains with broadcasting time for their own advertising in exchange for their agreement to conduct a specified number of week-long promotional displays of products which they sold (PL 11a; GF 16a). The contracts did not specify the products to be promoted, but provided that the broadcasting company might later designate these products subject to the right of the chain to decline to promote any product which it deemed not suitable for promotion in its stores (PL 100a; GF 128a).

Thereafter the broadcasting company solicited petitioner, a manufacturer and seller of products distributed through grocery stores, to purchase radio or television time and offered it, as an inducement for such purchase, in-store promotion of its products in the chain stores under contract (PL 11a-12a; GF 16a-17a). The promotional plan was communicated to prospective customers by means of brochures and circulars extolling the benefits of coordinated advertising in the home and in the store and setting forth the details of the offer (PL 100a-102a; GF 128a-130a). The leaflets indicated that, as a result of firm contractual commitments which the broadcasting company had previously negotiated with spec-

ified chain stores, purchasers of not less than a stated minimum amount of radio or television time would be provided, at no extra cost, with a specific number of in-store promotions of their products (Pet. A-4; PL 46a; GF 66a, 86a). The circulars also emphasized the size of the chains under contract, their annual sales volume, and the percentage of the retail market which they controlled (Pet A-4; PL 56a; GF 74a).

Petitioner's contracts for the purchase of broadcasting time did not mention the in-store promotions, but the promotional services, as set forth in the brochures, were rendered (Pet. A-4—A-5; PL 13a; GF 18a) and the contracts for broadcasting time were frequently renewed.[3] In many instances, after notification of the proposed date of a promotion, petitioner contacted the designated chain store for the purpose of arranging the details of the in-store promotional displays (PL 13a; GF 18a).

The few chain store customers of petitioner who received broadcasting time pursuant to their contracts with the broadcasting company were in competition with numerous other chain stores and a great many independent grocers, all customers of

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[3] The typical contract was of one year's duration, subject to right of termination at the end of 12 or 13 weeks (see GF 22a; PL 17a). Payments made by petitioner Lorillard between October 1953 and June 1956 to ABC and CBS under their respective plans amounted to about $412,286 (PL 74a-75a) and those made by petitioner General Foods under arrangements with ABC, CBS and NBC between August 1952 and June 1956 were approximately $421,228 (GF 108a-110a).

petitioner in the same market areas (PL 14a; GF 19a). However, these latter customers did not receive, nor were they offered, broadcasting time or anything of value in lieu thereof (*ibid*).

The hearing examiner found that, in determining whether §2(d) had been violated, the contracts between the broadcasting company and the chain stores and between petitioner and the broadcasting company were so interrelated that they must be viewed as integral parts of an overall plan, and that petitioner's payments to the broadcasting company for the purchase of broadcasting time were, in part, payment of something of value "for the benefit of" certain customers of petitioner "as compensation or in consideration for" services which they furnished to petitioner in connection with retail sale of petitioner's products (PL 106a-111a, GF 134a-139a). Since such payment or consideration was admittedly not "available on proportionally equal terms" to all other customers of petitioner competing with the favored customers in the sale of petitioner's products, the examiner concluded that petitioner's conduct clearly violated §2(d) of the Clayton Act (PL 112a-113a, GF 140a-141a).

The Commission adopted the examiner's initial decision as its own, and issued a cease-and-desist order (PL 114a, 113a; GF 142a, 141a).

The court below, in affirming the Commission's order, stated (Pet. A-10):

> The Commission's conclusion that the payments made by the petitioners to the broadcasting companies inured to the benefit not only of peti-

tioners, but also of the favored chains as compensation or in consideration for the in-store promotions afforded petitioners' products has warrant in the record and a reasonable basis in the law, and this court must accept it.

ARGUMENT

1. Unlike *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, cited by petitioners in support of the appropriateness of review here, this case presents no issue of "fundamental significance" in the application of §2 of the Clayton Act (see *id.* at 58). Rather, the issue which is presented is whether the Commission properly applied §2(d) of the Clayton Act to the particular factual situation here involved.

That section makes it unlawful for any seller to pay anything of value "to or for the benefit of a customer * * * in consideration for any services or facilities furnished by or through such customer" in connection with resale of the seller's goods, unless such payments are proportionally available to other customers competing in the distribution of its goods. Obviously the section would be violated if a seller of goods agreed with a customer that it would purchase from a broadcasting company broadcasting time for use by the customer in advertising its name and offerings, in exchange for special promotional displays of the seller's product in the customer's stores. The only difference between that situation and the present one is that here the transaction involved two steps, nominally independent: first, a contract between the customer and the broadcasting

company and, second, a contract between the seller and the broadcasting company. But the second step was premised on, and necessarily involved adoption by the seller of, the first step, or at least the facts warranted the Commission in so finding. The agreement between petitioner and the broadcasting company was the instrumentality through which the objective was attained; and it was, therefore, an integral part and a vital link in effectuating the entire advertising plan.

Section 2(d) is broadly framed and prohibits not only payment "to" a customer but also payment "for the benefit of" a customer. As the court below stated, the purpose of the section was "to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods" (Pet. A-6). The court said that this was made clear by the following statement in explanation of §§2(d) and 2(e), which are correlative, by Congressman Utterback, chairman of the House conferees (80 Cong. Rec. 9418):

> * * * The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. *The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the*

same purpose might be accomplished * * *. [Emphasis supplied.]

The promotional scheme in which petitioners participated clearly resulted in discrimination of the type Congress intended to eliminate. The court below said that petitioners' contention "stripped to its essentials is basically a plea for reliance upon technical rules of contract law", upon the assumption that the question of statutory violation is to be assessed by the application of "formal principles" governing actions based on written contracts (Pet. A-7). The court, in rejecting this test, correctly held, we submit, that the "real question" was whether petitioners had made payments "of benefit" to certain customers under circumstances falling within the §2(d) prohibition, and, this being the case, it was immaterial that petitioners had not "bound themselves to do so by a legally enforceable contract" (*ibid.*). What this Court has said as to the Sherman Act is equally pertinent here, namely, that the question of violation of the Act "must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of" the statutory prohibition. *United States* v. *Masonite Corp.*, 316 U.S. 265, 280.

There is ample support in the record for the Commission's finding that the contracts between the broadcasting company and the chain stores and between petitioners and the broadcasting company were integral, interrelated parts of an overall plan whereby petitioners (and other similarly situated sellers)

acquired for a money consideration the right to promotional services furnished by certain of their chain store customers. The broadcasting company's brochures made it crystal clear that petitioners were paying for two things—broadcasting time for their own use and broadcasting time for certain chain store customers; and that for such payment they were obtaining two things—broadcasting time for their own use and promotional displays of their goods in stores of certain chain store customers. Since there was thus a payment for advertising broadcast time obtained by chain store customers, it is immaterial that the broadcasting company may have initiated the plan or arrangement without prior agreement with petitioners. As the examiner said, each petitioner, by accepting the broadcasting company's sales-promotion plan, "became a party thereto, and cannot now evade full responsibility therefor" (PL 110a-111a, GF 139a).

We submit that petitioners' contention (Pet. 9) that their payments to the broadcasting company conferred upon their chain store customers "only the same indirect and generalized 'benefit' that all other cash receipts of the [broadcasting company] can be said to confer on anyone to whom the [broadcasting company] renders services" incorrectly characterizes the facts. The broadcasting company is operated for profit, and the broadcasting time given without charge to certain chain stores was not a gift, but was in return for something of value received from them, namely, the right to have certain products given promotional displays in their stores. When it passed on

this right to petitioners, in a package proposal for purchase of broadcasting time plus this right of display, that part of petitioners' payments made in order to obtain this right was a payment to the contracting store (through the broadcasting company) for display services furnished by it to petitioners.

We dispute petitioners' contention (Pet. 15) that the decision below "conflicts in principle" with *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (C.A. 7), certiorari denied *sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947. In that case certain companies which sold goods to the A & P grocery chain and which advertised in *Woman's Day*, a magazine published by A & P and sold in its stores for a nominal price, were charged with violating §2(e) of the Clayton Act, which prohibits a seller from contributing to the furnishing of any services or facilities connected with a purchaser's resale of the seller's goods, upon terms not accorded to all purchasers on proportionally equal terms. All advertisements in the magazine were handled by an independent advertising agency and were sold and purchased at rates comparable to those charged by magazines of like national circulation; all purchasers of advertising paid the same rates; and companies not selling goods to A & P contributed more than one-third of the magazine's total advertising revenue. On these facts, the court, in dismissing the §2(e) charge, held that the defendants were not contributing to the furnishing of the magazine any more than a railroad passenger could be said to contribute, by the payment of

his fare, to the furnishing of the railroad's services. We submit that, on these totally dissimilar facts, the cited decision is not even remotely in conflict with the decision in the instant case. Although petitioners argue (Pet. 15) that the purchase of advertising in Woman's Day was a "parallel situation" to the "purchase of advertising time from the broadcasting company," the Commission's finding of violation here rested on far more than petitioners' mere purchase of broadcasting time.

2. Petitioners seem to contend (Pet. 17-18) that the decision below is erroneous because based upon a ground other than that adopted by the Commission. The basis of the contention apparently is that the opinion of the court below does not refer to a statement made by the examiner, in the course of his 17-page initial decisions, that "the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between [petitioner] and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract" (PL 106a, GF 134a-135a). But the examiner's decisions (adopted by the Commission), read in their entirety, and particularly as expounded in the "Conclusion" (PL 111a-113a, GF 140a-141a), make it clear that the ruling was not, as petitioners contend (Pet. 18), grounded on petitioners' "motive and intention", but was grounded, like the decision of the court below, on the basic undisputed facts of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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